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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

October Term, 1948

No. ~~553~~ 21

**STEPHEN J. ROTH, Attorney General, Successor to EUGENE F. BLACK, Attorney General, in the name and on behalf of the People of the State of Michigan,**

**Petitioner,**

**vs.**

**PRESTON DELANO, Comptroller of the Currency of the United States of America, and**

**JOSEPH T. CONNOLLY, as Receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America,**

**Respondents.**

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND SUPPORTING BRIEF

**STEPHEN J. ROTH,**
**Attorney General,**

**EDMUND E. SHEPHERD,**
**Solicitor General,**

**ARCHIE C. FRASER,**
**Assistant Attorney General,**

**State Capitol,**
**Lansing 2, Michigan**

**JULIUS H. AMBERG,**
**Special Assistant Attorney General,**

**500 Michigan Trust Building,**
**Grand Rapids 2, Michigan,**

**Attorneys for Petitioner**

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Respondents.

## PETITION FOR WRIT OF CERTIORARI

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Stephen J. Roth, respectfully represents that he is Attorney General of the State of Michigan and successor to Eugene F. Black, Attorney General of said State, and in the name and on behalf of the People of the State of Michigan prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in this cause (No. 10,615 in said court,

*sub nom.* Eugene F. Black, Attorney General, v. Preston Delano, Comptroller of the Currency of the United States of America, et al.) on November 30, 1948, affirming the order of the District Court of the United States for the Eastern District of Michigan, Southern Division, entered on July 10, 1947. Petitioner was substituted as the appellant and as an attorney for the appellant in this cause by order of said Court of Appeals on January 11, 1949 (R. 102).

## OPINION BELOW

The opinion of the Court below, filed November 30, 1948, is reported in 170 F. 2, 966. It is also contained in the Record (page 98). No opinion was filed in the District Court.

## BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Sec. 1254(1), as revised by the Act of June 25, 1948; writ of certiorari being applied for within ninety days after the entry of judgment, as required by Title 28, U. S. Code, Sec. 2101(c), as revised as aforesaid.

Petitioner is also appealing from the same judgment below. This petition is therefore made as alternative to such appeal. Granting of this petition is sought if the appeal is dismissed for want of jurisdiction.

## SUMMARY STATEMENT

The case arose on petition of the Attorney General of Michigan, filed in the District Court June 25, 1946, for a declaratory judgment and other relief, pursuant to Sec.

274-D of the then Judicial Code, now in substance contained in Title 28, U. S. Code, Sections 2201 and 2202, as revised (R. 1-42). The petition prayed that the Court declare that Act 238 of the Public Acts of Michigan for 1897 and amendments thereto, as amended by Act 170 of the Public Acts of Michigan for 1941, being the law of Michigan covering escheatable estates and abandoned property, is applicable to deposits in First National Bank-Detroit, a national banking association with its office in Detroit in the District, which bank had been declared insolvent in 1933 and liquidated (R. 2-3, 15).

The Michigan statute is copied in full as an exhibit to the petition in the District Court (R. 18-38). Sec. 13a (R. 33) provides for escheat to the State where a depositor has any money or credits in the possession or control of a depository, where no dealings or transactions have been had with respect thereto between the depositor and the depository for seven years or more. Sec. 4b (R. 20) defines "depository" so as to include, among others, a bank and the receiver thereof.

The defendants were Preston Delano, Comptroller of the Currency, and Joseph T. Connolly, a resident of Detroit, Receiver of the bank and Detroit representative of the Comptroller (R. 2). Delano appeared specially and moved to quash and dismiss because he was not a resident of the District (R. 62-63). The motion was granted (R. 81), and no question having been raised in the Circuit Court of Appeals with respect to his dismissal, Delano is no longer in the case.

The petition also prayed that it be declared that the defendants are bound by the above mentioned Michigan laws

and that they be enjoined from removing certain records from the State of Michigan (R. 15-16).

Receiver Connolly appeared generally (R. 46) and moved to dismiss the petition (R. 64-65) because it failed to state a cause of action. It was upon this ground that the Circuit Court of Appeals decided the case. Connolly also claimed that the Court lacked jurisdiction over the subject matter and that suit would not lie against him as Receiver or as Representative of the Comptroller (R. 64-65).

There had been prior suits in the Circuit Court of Appeals for the Sixth Circuit relating to Michigan escheat laws. These will be discussed in the accompanying brief.

In the present case the State of Michigan claimed applicability of its escheat laws to deposits in the bank, where the depositors had proved claims but thereafter had not been located to receive liquidation dividend checks or, if they had received such checks, had failed to cash the same (R. 5, 12-13). The bank liquidation resulted in dividends to depositors aggregating 107.565% of the principal of the deposits, most of the distributions being authorized more than seven years before institution of this suit (R. 5). Inasmuch as the defendant refused to make report under the escheats law (R. 12-13), petitioner does not know the amount of dividend checks unclaimed or uncashed for more than seven years, but defendant's counsel stated in the Court below that the same totalled in the neighborhood of $300,000.00.

The District Judge granted defendant Connolly's motion and dismissed plaintiff's petition without opinion (R. 81).

The Circuit Court of Appeals affirmed the order of dismissal (R. 98) on the ground that Michigan's escheat law,

if applied to a national bank in liquidation, constitutes an unlawful interference with the liquidation of such bank as prescribed in the National Bank Law (Title 12, U. S. Code, Sec. 194; R. S. 5236), which provides:

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The Court, in affirming the dismissal, assumed without deciding that the action was brought in the right District (R. 100), thus basing its decision solely on the merits, viz., that the Michigan statute is invalid as repugnant to the National Bank Law.

## QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals erred in affirming the District Court's dismissal of plaintiff's petition upon the ground that the Michigan escheat law, in its application to deposits in a national bank in liquidation, constitutes an unlawful interference with the liquidation of the bank and is invalid as repugnant to the National Bank Law of the United States.

2. Whether, if the Circuit Court so erred, the District Court where the bank was located had jurisdiction over the subject matter and the right to render judgment affirming the applicability of the escheat law in a suit brought against Connolly, a resident of the District, Receiver of the national bank located in the District, and representative of the Comptroller of the Currency; questions which the Circuit Court of Appeals assumed in favor of plaintiff but did not decide.

## REASONS FOR THE ALLOWANCE OF THE WRIT

1. The Court below has decided an important question of federal law which has not been expressly decided by this Court but should be here settled. The application of State escheat laws is a matter of great and increasing importance throughout the country and is of particular importance to the State of Michigan in this case involving a national bank having $333,173,379.40 of proven deposits and claims (R. 66). The Court below endeavored to distinguish *Anderson National Bank v. Luckett*, 321 U.S. 233, on the ground that there an escheat law was held applicable only to a solvent and operating national bank (R. 99). If by going into liquidation a national bank may escape escheat laws, and if liquidation dividends on proven claims, where the claimant has disappeared or died, can thus be retained in the Treasury of the United States rather than paid to the State, which has sole jurisdiction over escheatable and abandoned property, then not only will the States be deprived of large sums to administer for their residents but the law of the United States will have been held to invade a subject matter heretofore held to be reserved to the States. Bank deposits, being the principal source of abandoned property, will thus, if the decision below is permitted to stand, be removed from

escheat at the very time their abandonment most usually becomes apparent, that is, when the bank goes into liquidation.

2. The Court below has decided a federal question relating to the supposed clash between State escheat laws and the National Bank Law in a way probably in conflict with applicable decisions of this Court. The Michigan escheat law does not substantially differ from that of Kentucky, upheld as to an operating national bank in *Anderson National Bank v. Luckett*, 321 U.S. 233. There is no valid reason why the Court below should not have followed that decision and upheld the escheat law with respect to a national bank in liquidation. There is nothing in the National Bank Law purporting to cut off the right of the State to proven but abandoned deposits, whether a national bank is in liquidation or not. The decision below is also in conflict with the principles announced in *United States v. Klein*, 303 U.S. 276, where the Pennsylvania escheat law was held validly applicable to funds belonging to bondholders who could not be found and which funds, pursuant to R.S. Sections 995 and 996 (now in substance Title 28, U.S. Code, Sections 2041 and 2042 as revised), had been paid from the registry of a federal court into the Treasury of the United States.

## CONCLUSION

For the foregoing reasons, as supported in the brief hereto annexed, petitioner respectfully submits that the petition for writ of certiorari should be granted.

STEPHEN J. ROTH,
Attorney General,

EDMUND E. SHEPHERD,
Solicitor General,

ARCHIE C. FRASER,
Assistant Attorney General,

State Capitol,
Lansing 2, Michigan

JULIUS H. AMBERG,
Special Assistant Attorney General,

500 Michigan Trust Building,
Grand Rapids 2, Michigan

Attorneys for Petitioner

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**Respondents.**

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### Right to Seek Certiorari in the Alternative

While petitioner is also appealing to this Court and believes that under Title 28, U.S. Code, Sec. 1254(2), as revised by the Act of June 25, 1948, this Court has jurisdiction to entertain such appeal, this Court may determine otherwise.

The present section permitting appeals is substantially the same as Sec. 240 of the Judicial Code (Title 28, U.S.

Code, Sec. 347, before its recent revision). See reviser's notes to present Sec. 1254. Under the present law, as under the former, an appeal precludes review by certiorari. Hence, if the appeal properly lies, the present petition for certiorari must be denied.

However, if it be determined that the appeal fails for want of jurisdiction, then it is clear that this Court may grant certiorari if application therefor was made within the time limited. *Bradford Electric Light Co. v. Clapper,* 284 U.S. 221.

It is requested that this petition for certiorari be held in abeyance pending determination of the jurisdiction of this Court on the appeal, as petitioner does not have the privilege, granted in appeals to State Courts, of having his appeal, if improvidently taken, regarded as a certiorari petition. Title 28, U.S. Code, Sec. 2103, as revised.

**Declaratory Judgment An Immaterial Factor**

This Court, in some declaratory judgment cases, may be disinclined to grant certiorari because the questions presented are not clearly defined, further facts are required, or the dismissal of the action had been in the exercise of the lower Court's discretion.

No such situation here exists. The Court below based its decision solely on the merits, holding that the Michigan escheats law is invalid as interfering with the liquidation of a national bank under the National Bank Law (R. 100). The facts are clearly stated in plaintiff's petition in the District Court and admitted by motion to dismiss, viz.:— First National Bank—Detroit since 1933 has been in liqui-

dation under receivership (R. 2-4). Liquidation dividends have been declared and checks issued therefor at intervals from 1933 to 1942, aggregating 107.565% (R. 5). A great number of dividend checks could not be delivered on validly proven claims, or, if so delivered, have not been cashed, the persons entitled thereto having abdandoned the same for seven years (R. 4-5, 12), and the defendant Receiver has failed and refused to make report thereon under the Michigan escheat law (R. 11-13). A clear-cut issue is therefore presented, viz.: Is the Michigan law requiring report and payment to the State Board of Escheats invalid as applied to national banks in liquidation?

**Earlier Decisions in the Court Below**

Of course this Court is not bound by decisions of the Circuit Court of Appeals. Neither are the earlier cases otherwise binding; nor did defendant Connolly so plead (R. 64-65).

Prior suits have been brought by then Attorneys General of Michigan against the Comptroller and the then receiver of this same bank, which suits related to dormant deposits in the bank *where the depositor had failed to present claim.* The first of these was based on the Michigan law prior to the amendment presently involved. *Starr v. O'Connor,* 118 F.2, 548 (decided March 14, 1941), certiorari denied 314 U.S. 695. The second related to the Michigan law here involved, but likewise covered deposits where no claim had been filed by the depositor. *Rushton v. Schram,* 143 F.2, 554 (decided May 31, 1944). A second appeal of the first case related to the Michigan law involved herein, but likewise to deposits upon which no claim had been filed. *Starr v. Schram,* 143 F.2, 561 (decided May 31, 1944). The Court below ruled against Michigan's claims in these prior suits.

In the present case the State of Michigan claimed applicability of its escheat laws to deposits in the bank where the depositors had proven claims but thereafter had not been located to receive liquidation dividend checks or, if they had received such checks, had failed to cash the same for seven years or more (R. 5, 12-13). At the end of the opinion below (R. 101) the Court recognized this difference from the prior suits, but held it immaterial.

When escheat is sought with respect to deposits where the depositor has never filed claim, it may well be argued that the State law does conflict with the National Bank Law (Title 12, U.S. Code, Sec. 194), which requires the Comptroller to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction", and which further requires that "the remainder of the proceeds, if any, shall be paid over to the shareholders" of the bank.

Thus a non-proven claim may be foreclosed and payments on proven claims thus augmented or, if a surplus results, the amount otherwise payable on an unproven claim may go to shareholders. This would be analogous to distribution in bankruptcy and equity receiverships. The National Bank Law, in the case of unproven claims, may thus decree a tontine right for the benefit of proven claims and shareholders and foreclose the State's right to succeed to unproven abandoned claims. This may be the correct basis for the decisions of the Court below in the earlier cases relating to unproven claims. It was the basis of denying escheat with respect to unproven claims in the case of *In re Commercial National Bank*, 45 Fed. Supp, 482 (E.D. Pa.), affirmed on opinion below 134 F.2, 172 (C.C.A. 3).

**The Decision Below Is Erroneous**

The Court below held, however (R. 101), that the fact that the present case involves proven claims does not distinguish it from the prior cases in that Court of unproven claims. But Sec. 194 of the National Bank Law does not prescribe a tontine right whereby funds payable on proven claims, later abandoned, go to augment payments to other claimants or to shareholders. Cf. *Provident Institution for Savings v. Malone,* 221 U.S. 660, 665, and *Security Savings Bank v. California,* 263 U.S. 282, 286. Payments, by the law, must be made ratably on proven claims. *Merrill v. National Bank of Jacksonville,* 173 U.S. 131, 143; *American Surety Co. v. Bethlehem National Bank,* 314 U.S. 314, 317. The respondent has never claimed otherwise, but merely that such money must be held indefinitely in the United States Treasury until the claimant appears, if ever, the United States keeping the same if the claimant never appears. No federal law provides for court proceedings and publication of notice to locate a disappeared claimant or his successors.

The National Bank Law (Sec. 194) requires payment on proven *claims,* not necessarily to the *claimant.* Thus a successor to an original claimant, by assignment, attachment, subrogation, or administration of his estate, is held entitled to stand in the original depositor's shoes. *Earle v. Conway,* 178 U.S. 456 (attachment of deposit in insolvent national bank); *American Surety Co. v. Bethlehem National Bank,* 314 U.S. 314 (subrogation to depositor in insolvent national bank); see also *Provident Institution for Savings v. Malone,* 221 U.S. 660, 665, and *Anderson National Bank v. Luckett,* 321 U.S. 233, 252.

The State has sole power over abandoned property just as it does over other transfers and devolution of property (*Anderson National Bank v. Luckett*, 321 U.S. 233, 240-241, 248) and hence proper escheat laws apply to banks, whether State or national. *Provident Institution for Savings v. Malone, supra; Anderson National Bank v. Luckett, supra; Security Savings Bank v. California, supra.*

Nor does the fact that insolvent national bank funds are paid to the Comptroller and by him covered into the Treasury (Sec. 92 of the National Bank Law) mean that the escheat law is repugnant to the federal law. In *United States v. Klein*, 303 U.S. 276, the Pennsylvania escheat law was held applicable to funds deposited in a federal court suit, although the same had been covered into the Treasury as required by federal statute.

No valid reason exists, or was even suggested by the Court below, why the Michigan escheat law, in the case of a proven claim, should not apply to national banks, whether closed or open, as this Court has held subrogation, attachment, and other assignment and devolution to apply, or in what respect the same would be repugnant to the National Bank Law. The Michigan law does not infringe the National Bank Law, but is impartial, applying to all banks and other depositories without discrimination as to national banks. The bank and its receiver should perform their duty and pay the abandoned deposits to the State of Michigan, to be held for the depositors or their successors if ascertained. Cf. *Anderson National Bank v. Luckett*, 321 U.S. 233, 248-249, 252.

An important and substantial question is presented. Unless the Receiver can be required to make report to the State of Michigan, the State, not knowing the names of depositors or the amounts abandoned, cannot proceed with administration of depositors' estates or other proceedings

permitted by the Michigan law, in order to have the money paid to the persons, entitled thereto if they can be ascertained.

The Receiver did not claim below that the Michigan statutory procedure violated due process or amounted to a forfeiture instead of a true escheat, such as existed in *First National Bank of San Jose v. California*, 262 U.S. 366. Even if such question had been raised as to the Michigan law here involved, the Michigan law is a proper one. While there are presumptions of death or abandonment after seven years, these are rebuttable and the depositor or his successors may *at any time* in the future recover the fund from the State (Sections 9b, 10, 13, 13a, 22; R. 28-37). Service by publication is required if the depositor or his heirs cannot be located for service (Sections 9b, 10a; R. 28, 30). Full indemnity is given to the depository which makes payment to the State as to claims of the depositor, his heirs, holders for value and assigns (Sec. 23; R. 38). The provisions of the Michigan law more liberally protect the depositor and the bank than those approved in *Anderson National Bank v. Luckett*, *supra*, and *Security Savings Bank v. California*, *supra*. Report is required (Sections 6, 6a; R. 21-23), as permitted by the *Anderson* case (p. 252). This, of course, is essential in order to permit the State to proceed further.

**Minor Issues**

The Court below assumed such issues in plaintiff's favor but did not decide them (R. 100). They should be decided in plaintiff's favor.

The Receiver claimed the District Court had no jurisdiction over the subject matter (R. 64). Of course a suit concerning a claim against an insolvent national bank is a case for winding up the affairs of the bank, of which the District Court was given jurisdiction under Sec. 24 of the

Judicial Code (Title 28, U.S. Code, formerly Sec. 41(16), now revised as Sec. 1348). See *International Trust Co. v. Weeks*, 203 U.S. 364, and the cases above cited, where suits with respect to claims were entertained against bank receivers in the District Courts in which the banks were located.

Defendant claimed (R. 64-65) that suit could not be brought against the Receiver because, under Sections 192 and 194 of the National Bank Law, the receiver pays the money to the Comptroller and the latter pays the dividend. Connolly, at the time of suit, was alleged and admitted to be the Receiver (R. 3-4, 72). Suits may be brought against receivers with respect to claims against a national bank, even though the Comptroller is the one to pay the dividend and is not sued. *Case v. Bank*, 100 U.S. 446; *Armstrong v. American Exchange National Bank*, 133 U.S. 433; *Earle v. Conway*, 178 U.S. 456; *Merrill v. National Bank of Jacksonville*, 75 Fed. 148 (C.C.A. 5), affirmed without discussing the point, 173 U.S. 131; *American Surety Company v. Bethlehem National Bank*, 314 U.S. 314.

While two of three judges of the Court below, in one of the earlier cases, *Rushton v. Schram*, 143 F.2, 554, held in a case involving unproven claims that the Michigan law here involved was not retroactive, this was not only contrary to the Michigan Supreme Court decision in *Evans Products Co. v. State Board*, 307 Mich. 506, but was abandoned in substance when the entire Court, in *Starr v. Schram*, 143 F.2, 561, and in the instant cause, placed the decision solely on the ground that the Michigan law constituted an unlawful interference with a national bank in liquidation. In any event, it is not a retroactive application of the Michigan 1941 law to apply it to antecedent facts (part of the seven years' abandonment of proven claims). *Cox v. Hart*, 260 U.S. 427, 435. In *Provident Institution for Savings v. Malone, supra, Anderson National*

*Bank v. Luckett, supra,* and *United States v. Klein, supra,* escheat laws passed or amended after all or a part of the dormancy period were held properly to embrace such prior periods.

Hence minor questions, all of which should be decided in plaintiff's favor and which the Court below assumed in plaintiff's favor, should not prevent review of the chief meritorious federal question of whether the escheat law, as applied to proven but abandoned claims against national banks in liquidation, unlawfully interferes with such liquidation and is repugnant to the National Bank Law.

Respectfully submitted,

STEPHEN J. ROTH,
Attorney General,

EDMUND E. SHEPHERD,
Solicitor General,

ARCHIE C. FRASER,
Assistant Attorney General,

State Capitol,
Lansing 2, Michigan

JULIUS H. AMBERG,
Special Assistant Attorney General,

500 Michigan Trust Building,
Grand Rapids 2, Michigan

Attorneys for Petitioner